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No. 94-1120

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

CENTURY-NATIONAL INSURANCE CO., *et al.*,
Petitioners,

v.

CHARLES QUACKENBUSH,
Insurance Commissioner of California, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of California

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SUPPLEMENTAL BRIEF OF PETITIONERS IN RESPONSE TO RESPONDENT'S SUPPLEMENTAL BRIEF

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The Commissioner's supplemental brief raises one new argument that warrants a response.[1] The Commissioner argues that petitioners were only *amici*, and not parties, in the California Supreme Court with respect to all issues

[1] The Commissioner also repeats his earlier argument about the appropriateness of this Court's consideration of the facial constitutionality issue presented to this Court, but that argument was fully answered in our Reply Brief.

decided by that court except for the "leverage issue." For that reason, the Commissioner contends, even though petitioners' refund liability (amounting to hundreds of millions of dollars) will unavoidably be governed by the California Supreme Court's confiscation standards, petitioners lack standing to seek review of those standards, no matter how much the decision below otherwise warrants this Court's review and reversal.

As an initial matter, however, the Commissioner's new argument violates this Court's Rules. The argument is in no way based on or dependent on 20th Century's recent settlement, the sole excuse cited by the Commissioner for his supplemental filing; indeed, 20th Century is not even one of the present petitioners (No. 94-1120). This contention, if it had merit, was fully available to the Commissioner to make in his brief in opposition, yet he made no such argument there. Accordingly, the supplemental brief is in direct violation of this Court's Rule 15.7, which states that "[a] supplemental brief must be restricted to new matter," that is, "to new cases or legislation or other intervening matter not available at the time of the party's last filing." The brief should be disallowed.

In any event, as the late timing itself indicates, the Commissioner's last-minute effort to avoid review of the decision below is wrong. The contention mischaracterizes the role of petitioners in the judgment below. As a formal as well as practical matter, petitioners—as part of the Hartford Steam Boiler group below—were parties, not merely *amici,* to the California Supreme Court's judgment on all of the facial-constitutionality issues, not just on the leverage issue.

Thus, beginning in the Superior Court, the Hartford Steam insurers participated fully on *all* of the facial-validity issues as *parties,* both in briefs and argument, even being allowed to introduce evidence going to issues other than the leverage issue. *See* Nov. 30, 1992 Tr. 16, 23. The Superior Court held the Commissioner's regula-

tions invalid on their face. The court framed its order and judgment without in any way dividing up issues party by party or otherwise limiting the reach of the judgment with respect to the Hartford Steam group, including petitioners. Pet. App. 212a-213a; *see also* Judgment dated March 22, 1993.

The Commissioner appealed from the Superior Court decision, and the Hartford Steam group *cross-appealed. See* Pet. App. 42a. Since petitioners prevailed on the leverage issue in the Superior Court (Pet. App. 205a), the cross-appeal necessarily involved other facial-validity issues, including the cost-of-capital argument based on *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944), that petitioners now raise in this Court, an argument on which petitioners did not fully prevail in the Superior Court (*see* Pet. App. 177a-195a). The Hartford Steam group expressly spelled out the *Hope* issue in filing, as a party, its Answer to Petitions for Transfer in the California Supreme Court. The California Supreme Court then took jurisdiction over and expressly decided all of the appeals *and cross-appeals* before it. Pet. App. 3a, 42a. Contrary to the Commissioner's new position, therefore, the California Supreme Court's judgment with respect to petitioners could not have been and was not limited to the leverage issue.

Indeed, at no point did the Commissioner ever suggest, or the California Supreme Court rule or even intimate, that the Hartford Steam group's cross-appeal—which, as noted, could not have involved the leverage issue—was not properly before the California Supreme Court. Nor did the Commissioner ever contest the propriety of the Hartford Steam group's full participation as a party, in briefs and argument, on *all* of the facial-invalidity issues. Not surprisingly, then, the California Supreme Court rendered a single judgment that in no way divided up issues party by party. Pet. App. 128a ("For the reasons stated above, we conclude that we must reverse the judgment

of the superior court and direct that court to render judgment in favor of the Insurance Commissioner and Voter Revolt and against 20th Century, Hartford, State Farm, et al.").

Given these circumstances, it is no mystery that the Commissioner did not think to dispute petitioners' party status on the *Hope* issue when he filed his brief in opposition. In technical as well as real terms, petitioners plainly are subject to the California Supreme Court's judgment declaring the cost-of-capital standard of *Hope Natural Gas* not to state a constitutional minimum. The Commissioner's "standing" objection—presented in violation of Sup. Ct. R. 15.7 in a last-ditch effort to wear down petitioners through unnecessary delay of review—should be rejected.[2]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[2] At a minimum, any residual uncertainty on the question of petitioners' party status should not be a ground for denying the petition without a remand for the Commissioner to present his contention about party status to the California Supreme Court.